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No. 94-500

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ERICH AND HELEN B. SCHLEIER,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS
AND THE
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose.

More than one-third of AARP's thirty-three million members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA). One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and retain older workers, and to help older workers overcome the obstacles they face because of age.

The National Employment Lawyers Association (NELA) is a voluntary organization of almost 2,000 attorneys who specialize in the representation of the individual in controversies arising out of the workplace. NELA's membership and its governing body are composed of experts in state and federal equal employment opportunity statutes as well as wrongful discharge law. NELA has a direct interest in cases involving the civil rights statutes, as NELA members regularly counsel and represent clients in claims under these statutes.

As part of their respective advocacy efforts, AARP and NELA have filed numerous *amicus curiae* briefs in the United States Supreme Court and federal courts of appeals in cases involving employment and discrimination laws. In particular, AARP and NELA participated as *amicus curiae* in United States v. Burke, 112 S. Ct. 1867 (1992), McKennon v. Nashville Banner Co., 63 U.S.L.W. 4104 (U.S. Jan. 23, 1995), and Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993).

AARP and NELA concur with the arguments set forth by Respondents that ADEA damages should be excluded from gross income as compensation for personal injuries under Internal Revenue Code Section

104(a)(2). Amici submit this brief^{1/} to focus on the provisions of the ADEA that Congress devised to redress the injuries caused by age discrimination. AARP and NELA's brief also explains the key differences between the statutory provisions of the ADEA and Title VII^{2/}, which are significant to the analytical framework of United States v. Burke, 112 S. Ct. 1867 (1992), as applied to the ADEA.

SUMMARY OF ARGUMENT

When Congress enacted the ADEA in 1967, it gave national recognition to the severity and pervasiveness of age discrimination in the workplace. McKennon v. Nashville Banner Publishing Co., 63 U.S.L.W. 4104 (U.S. Jan. 23, 1995), slip op. 4. Age discrimination "[has] a devastating effect on the dignity of the individual and result[s] in a staggering loss of human resources vital to the national economy." Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 410 (1985).

At issue in this case is whether ADEA damages are excludable from gross income as damages received on account of "personal injuries," under Internal Revenue Code Section 104(a)(2). There can be no doubt that age discrimination harms an individual's rights and personal dignity. There should also be no doubt that Congress carefully designed the ADEA to redress those injuries.

^{1/} The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

^{2/} Unless otherwise noted, references to Title VII are to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prior to the amendments made by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

AARP and NELA submit that the ADEA evidences a tort-like conception of injury and remedy that recognizes the personal injury caused by age discrimination, consistent with the analytical framework of United States v. Burke, 112 S. Ct. 1867, 1873 (1992). The ADEA's purposes and its broad remedial measures, providing for a jury trial, both legal and equitable relief, and liquidated damages, reflect a tort-type statute. Therefore, ADEA damages should be excluded from gross income under IRC § 104(a)(2).

ARGUMENT

I. THE ADEA PROVIDES BROAD REMEDIAL MEASURES THAT REDRESS PERSONAL HARMS CAUSED BY AGE DISCRIMINATION.

When Congress enacted the ADEA, it was well aware of the personal harm inflicted by age discrimination. "I have long felt it is a particular tragedy to amputate a human being's function, to strip productive persons of their skills, cheating them of the dignity of self-support." 113 Cong. Rec. 31256 (1967) (Remarks of Sen. Young). This Court has also acknowledged Congress' conclusion that

age discrimination was profoundly harmful in at least two ways. First, it deprived the national economy of the productive labor of millions of individuals.... Second, it inflicted on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations.

EEOC v. Wyoming, 460 U.S. 226, 231 (1983).

Age discrimination unquestionably causes personal injury, as the Commissioner concedes. The legislative

history of the ADEA emphasizes Congress' understanding of the personal harm inflicted by discrimination. It also reveals Congress' recognition that such injuries were difficult to measure.

As Representative Eilberg eloquently exhorted his colleagues to pass the ADEA, he decried the difficulty of measuring the harm of discrimination:

The harm which these practices bring to the lives and families of these American workers is incalculable; the harm such practices bring to the strength of this Nation is intolerable...

The financial and social costs, of course, are nothing compared with the costs in terms of human suffering and welfare which come about as the result of discriminatory practices in employment because of age. Employment plays a very important role in the makeup of the modern American and this role cannot be measured in the dollars he carries home on payday. Self-esteem, self-satisfaction, and personal security are important byproducts of employment in industrial America. To deny a person the opportunity to compete for jobs on the basis of ability and desire, solely because of unfounded age prejudice, is a most vicious, cruel, and disastrous form of inhumanity.

113 Cong. Rec. 34745 (1967). Similar sentiments were echoed by Representative Dwyer, as she urged passage of the ADEA:

The cost of such experience in terms of mental anguish, family suffering, lost income, and damaged self-respect is too high to measure.

113 Cong. Rec. 34751 (1967).

Congress recognized that the personal harm age discrimination inflicted was difficult to measure, if not incalculable. But that does not mean that Congress was unable to devise some remedy to redress personal injuries. Rather, the measures Congress chose to remedy age discrimination -- legal and equitable relief, plus liquidated damages -- signify Congress' attempt to provide some relief for the very personal losses suffered by victims of age discrimination.

In particular, the provision of liquidated damages represents a "good faith effort to estimate actual damages that will probably ensue." See Black's Law Dictionary 6th Ed., 391 (1990). Indeed, by incorporating the liquidated damages provision of the Fair Labor Standards Act, 29 U.S.C. § 216(b), into the ADEA, Congress is presumed to have understood^{3/} the meaning of liquidated damages as "compensation ... in damages too obscure and difficult of proof for estimate...." Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583-584 (1942).^{4/}

The damages scheme of the ADEA reflects Congress' effort to put rough measurements on the incalculable personal harms caused by discrimination. At the time, Congress apparently viewed these measures as sufficient to "compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'" (citations omitted) Burke, 112 S. Ct. at 1871.

^{3/} "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard, Inc. v. Pons, 434 U.S. 575, 581 (1978).

^{4/} The Commissioner's brief in this case before the Fifth Circuit admits that "liquidated damages compensate for damages ... that are too obscure and difficult of proof for estimate." (citations omitted). Appellant's Brief at 25 in Commissioner v. Schleier, No. 93-5555 (5th Cir.).

While conceding that "discrimination based upon age can effect 'personal' injuries,"^{5/} the Commissioner argues that the ADEA's remedies do not compensate at all for any personal injury, but are limited to economic losses. The Commissioner's arguments rest on two faulty premises. First, the Commissioner reasons that the remedial provisions of the ADEA seem to be more contractual in nature,^{6/} rather than tort-like. Second, the Commissioner seems to suggest that a statute must contain explicit language permitting compensatory damages for traditional tort injuries, in order to be tort-like. Both premises are flawed.

The ADEA grants a right to older persons to be free from ageism in the workplace and imposes a duty on employers to refrain from ageist practices and policies. The rights and duties arise from the operation of the statute, which is the traditional definition of a tort. See Black's Law Dictionary, 1489 (6th ed. 1990).

Moreover, "[t]he public law duty not to discriminate exists regardless of the parties' contractual relationship."

^{5/} Petitioner's Brief at 10.

^{6/} This argument appears similar to the argument advanced by the Commissioner and rejected by the Ninth Circuit in Schmitz v. Commissioner, 34 F.3d 790, 793 (9th Cir. 1994), petition for cert. filed, (U.S. Nov. 23, 1994) (No. 94-944), that "ADEA actions are basically ex contractu."

The Commissioner argues that because jury trials and liquidated damages are available for contract claims, their inclusion in the ADEA negates a tort-type conception of the ADEA. Petitioner's Brief at 21, n.11. Yet, Burke relies on the availability of jury trials as an indicia of a tort-type statute, as discussed infra, pp. 11-12. Furthermore, neither the purpose, nor the amount of ADEA liquidated damages are contractually based, but derive from distinct statutory purposes to compensate individuals and to deter violations of the law. See discussion infra, p. 10.

Schmitz v. Commissioner, 34 F.3d 790, 793 (9th Cir. 1994). Indeed, the ADEA grants individual rights and imposes obligations on employers even where no contractual relation exists, such as between an employer and applicant in a hiring context. Schmitz, 34 F.3d at 793. Furthermore, this Court has emphasized "[t]he distinctly separate nature of these contractual and statutory rights." Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974).

As this Court recently declared, "the ADEA ... reflects a societal condemnation of invidious bias in employment decisions." McKennon v. Nashville Banner Publishing Co., 63 U.S.L.W. 4104 (U.S. Jan. 23, 1995), slip op. 4. Ageism violates the basic democratic principle that each person should be judged based on the individual merit rather than based on group characteristics.^{2/} Age discrimination in employment negates the cherished goals of independence and fulfillment. The combination of the denial of opportunity and the loss of choice represents no less than an attack on individual freedom.^{3/} To say that age discrimination injuries and remedies are founded on contractual principles denigrates the importance of individual rights and the national policy condemning age discrimination.

The second flaw in the Commissioner's position that the ADEA does not compensate for personal injuries is her overly technical view that a statute must denominate specific and traditional compensatory

^{2/} E.B. Palmore, Ageism: Negative and Positive 7 (1990).

^{3/} Mildred and Claude Pepper Foundation, The Age Discrimination in Employment Law: Tapping Resources for Productive Aging: First Annual Report, 19 (1990).

damages in order to be tort-like.^{9/} The Commissioner's brief improperly narrows the analysis under IRC § 104(a)(2) to one factor -- compensatory damages for traditional harms.^{10/}

The Commissioner's restrictive approach clearly conflicts with this Court's emphasis on the "range" of statutory remedies available in determining a tort-like conception of remedy. Burke, 112 S.Ct. at 1871 (emphasis added). Indeed, the Court's reasoning in Burke is instructive that "Nothing in this remedial scheme purports to recompense ... for any of the other traditional harms associated with personal injury, such as pain and suffering" Burke, 112 S. Ct. at 1873 (emphasis added). In recognizing that a statute should include "any"^{11/} tort-type harms, the Court made room for a broad range of injuries and remedies, and did not restrict that range to the injuries or remedies listed by way of example.^{12/}

^{9/} Petitioner's Brief at 18. The Commissioner quotes from Burke's reference to damages, "such as damages for emotional distress or pain and suffering," as if the Court's language mandates these explicit remedies for a statute to be considered "tort-like."

^{10/} Petitioner's Brief at 14-18. This Court has never addressed whether traditional compensatory damages for emotional distress or pain and suffering may be available under the ADEA's grant of "legal or equitable relief as may effectuate the purposes of the" Act, 29 U.S.C. § 626(c), and need not resolve the issue to conclude that ADEA damages serve a compensatory purpose.

^{11/} When the term "any" is used in a statute, this Court views the term as "imply[ing] a broad scope." Public Employees Retirement System v. Betts, 492 U.S. 158, 173 (1989).

^{12/} Similarly, the term "such as" "suggests enumeration by way of example, not an exclusive listing." Id.

Burke further considers the purposes of the remedy in its analysis:

Although these damages often are described in compensatory terms, (citations omitted), in many cases they are larger than the amount necessary to reimburse actual monetary loss sustained or even anticipated by the plaintiff, and thus redress intangible elements of injury that are "deemed important, even though not pecuniary in [their] immediate consequence[s]." (citations omitted).

Burke, 112 S. Ct. at 1871. In other words, the function the damages serve is instructive for determining its relation to tort-type principles.

The purposes served by ADEA liquidated damages are particularly important here. The majority of courts have held that ADEA liquidated damages have both compensatory and deterrent aspects. See Schmitz v. Commissioner, 34 F.3d at 796 (citing cases).

The Commissioner's contrary view that ADEA liquidated damages are not compensatory at all, but exclusively punitive, is not sustainable.^{13/} Indeed, a unanimous Court recently echoed the compensatory and punitive purposes of the ADEA's remedies in recognizing that "[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the

^{13/} The Commissioner's brief implies that the Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125-26 (1985), concluded that ADEA liquidated damages are "not compensatory." Petitioner's Brief at 20. Thurston did not examine the compensatory functions of the ADEA damages provisions at all or examine such damages "from the recipient's perspective." Schmitz v. Commissioner, 34 F.3d at 795. AARP and NELA concur with the arguments advanced by Respondents that ADEA liquidated damages have both compensatory and punitive aspects and will not repeat those arguments here.

ADEA." McKennon v. Nashville Banner Publishing Co., 63 U.S.L.W. 4104, slip op. at 5.

The harm to one's dignity and self esteem caused by ageist practices can be severe, albeit incalculable. By providing broad remedies in the ADEA, Congress sought to redress, not ignore, the personal injury inflicted by age discrimination.

II. THE JURY TRIAL AND DAMAGES PROVISIONS OF THE ADEA DIFFER SIGNIFICANTLY FROM TITLE VII.

In United States v. Burke, 112 S. Ct. 1867 (1992), this Court set forth an analytical framework for determining whether damages received on account of personal injuries are excludable from gross income under IRC § 104(a)(2). The majority in Burke viewed the remedial scheme of a statute as indicative of whether damages under the statute were tort-like. 112 S. Ct. at 1871.

Burke focused on two elements -- jury trials and the range of statutory remedies. 112 S. Ct. at 1873-74. The Court concluded that Title VII was not "tort-like," because it did not allow for a jury trial, nor did it provide for any damages beyond lost wages. 112 S. Ct. at 1874. In contrast to Title VII, the ADEA contains both of the elements that the Court found critical to its analysis in Burke.

The right to a jury trial is one of the hallmarks of a tort remedy, as this Court held in Burke. 112 S. Ct. at 1872. "Title VII plaintiffs, unlike ordinary tort plaintiffs, are not entitled to a jury trial." Burke, 112 S. Ct. at 1872.

Like tort plaintiffs, and unlike Title VII plaintiffs, ADEA plaintiffs have a right to a jury trial. 29 U.S.C. § 626(c)(2). Indeed, Congress granted ADEA plaintiffs this important right more than a dozen years

before providing a similar right to Title VII plaintiffs through the Civil Rights Act of 1991. See Pub. L. No. 102-166, 105 Stat. 1071. Furthermore, the right to a jury trial under the ADEA remains broader than the right under Title VII. The Civil Rights Act of 1991 limits the jury trial right to disparate treatment claims, id., whereas the ADEA contains no such limitation. See 29 U.S.C. § 626(c)(2).

The Commissioner attempts to minimize the import of the right to a jury trial as meaningless to the Burke analysis. Yet, this Court emphasized the availability of jury trials combined with the broad relief provisions as key components in determining whether a statute "sounds basically in tort." 112 S. Ct. at 1874.

The second element that the Court examined in Burke was the range of statutory remedies. The key question in this part of the Burke analysis is whether the availability of additional damages under the ADEA represents remedies "larger than the amount necessary to reimburse actual monetary loss sustained or even anticipated by the plaintiff...." 112 S. Ct. at 1871. The answer should be clearly "yes."

The courts below and the parties have focused on the ADEA's liquidated damages provision as a remedy in addition to back pay. The ADEA authorizes an award of liquidated damages to victims of age discrimination who can prove that their employer willfully violated the law. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1708 (1993). In contrast, monetary relief under Title VII was limited to back pay, which the Court in Burke concluded was a critical deficiency in ruling that Title VII remedies were not tort-like. 112 S. Ct. at 1873.

Another statutory difference between the remedial provisions of the ADEA and Title VII is ADEA Section 626(c)(1), which grants a cause of action to

victims of age discrimination for "such legal or equitable relief as will effectuate the purposes of" the ADEA. 29 U.S.C. § 626(c)(1). In Lorillard, Inc. v. Pons, 434 U.S. 575 (1978), this Court focused on the language of the ADEA's provision for legal relief in distinguishing it from Title VII's remedial provisions. "Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both "legal or equitable relief" in the ADEA, but did not authorize "legal" relief in so many words under Title VII." Lorillard, Inc. v. Pons, 434 U.S. at 584.

Disregarding this Court's view that "significant differences" exist between the "remedial and procedural provisions" of the ADEA and Title VII, Lorillard, Inc. v. Pons, 434 U.S. at 584, the Commissioner argues that the statutory scheme of the ADEA is like Title VII's remedial scheme.^{14/} While the ADEA and Title VII share common purposes and contain a number of similar provisions, McKennon v. Nashville Banner Publishing Co., 63 U.S.L.W. 4104 (U.S. Jan. 23, 1995), slip op. at 5, the significant differences in the remedial provisions of the two statutes cannot simply be swept aside. As this Court emphasized in Lorillard, Inc. v. Pons, 434 U.S. at 584, Title VII did not authorize "legal" relief. Nor did Title VII contain any language authorizing remedies broad enough to further the purposes of the statute. Compare 42 U.S.C. § 2000e-5(g). Nor did Title VII provide for liquidated damages.

Furthermore, the ADEA's provisions for jury trials and legal as well as equitable relief parallel some of the elements in other discrimination statutes, which the Court in Burke viewed as significant and different from Title VII. For example, the Court noted that both Section 1981, 42 U.S.C. § 1981, and Title VIII

^{14/} Petitioner's Brief at 18-19.

of the Civil Rights Act of 1968 provide for jury trials and legal and equitable relief. Burke, 112 S. Ct. at 1873-74.^{15/}

The 1991 amendments to Title VII adding provisions for jury trials and compensatory and punitive damages "signal[ed] a marked change in [Congress'] conception of injury redressable by Title VII." Burke, 112 S. Ct. at 1874, n.12. Following that signal, the Commissioner ruled that Title VII damages under the Civil Rights Act of 1991 are now excludable from gross income, even if the damages received are limited to back pay. Rev. Rul. 93-88, 1993-2 C.B. 61. Yet, the Revenue Ruling omits any consideration of ADEA damages, even though the 1991 amendments to Title VII arguably made its statutory scheme more like the ADEA.

The Commissioner's approach to the tax treatment of ADEA damages may be viewed as result-driven, if the result is that ADEA damages are taxable. The result is inconsistent and inequitable tax policy that devalues the serious damage caused by age discrimination.^{16/}

^{15/} While these two statutes also contain compensatory and punitive damages provisions, the Court did not rule that these specific damages alone determine the tort-like nature of a statute. See discussion supra p. 9.

^{16/} The result of such policy becomes even more problematic when this approach is applied to damages received on account of multifaceted discrimination, such as age and gender, under both the ADEA and the amended Title VII. Claims of multifaceted discrimination, for example, brought by older women, have increased over the years and will continue to rise as older women make up a greater portion of the work force. See Francine K. Weiss, Employment Discrimination Against Older Women: A Handbook on Litigating Age and Sex Discrimination Cases 1 (1989).

CONCLUSION

For the foregoing reasons, AARP and NELA respectfully submit that ADEA damages, both back pay and liquidated damages, should be excludable from gross income as compensation received on account of personal injuries.

Respectfully submitted,

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